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Property: Not Everything Is Relative Anymore: A New Rule but Little Guidance in Airport Zoning Regulation Takings Claims--Decook V. Rochester Int'l Airport Joint Zoning Bd

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**PROPERTY: NOT EVERYTHING IS RELATIVE
ANYMORE: A NEW RULE BUT LITTLE GUIDANCE IN
AIRPORT ZONING REGULATION TAKINGS CLAIMS—
*DECOOK V. ROCHESTER INT’L AIRPORT JOINT ZONING BD.***

Frances L. Kern[†]

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“Everything is relative in this world, where change alone endures.”
-Leon Trotsky¹

I. INTRODUCTION

Or so the saying goes. This may no longer be the case in a narrow category of regulatory takings claims in Minnesota. Although takings jurisprudence in the United States, especially with regard to regulations, is notoriously enigmatic,² the Minnesota Supreme Court recently attempted to clarify the murky waters by affirming the standard to be applied in airport zoning³ disputes in *DeCook v. Rochester International Airport Joint Zoning Board*.⁴ In so doing, however, it opened the door to a new inquiry into how much economic impact a regulation must have on the market value of a landowner’s property in order to be considered a taking.

This note begins by surveying important cases in federal and Minnesota takings law that lay a foundation for *DeCook*.⁵ With that background in mind, it discusses the facts and reasoning of the court in *DeCook*⁶ and then analyzes the decision.⁷ It concludes by arguing that the decision, while seeming to clear the muddle of Minnesota regulatory takings jurisprudence by creating a bright-line rule, undermines the apparent virtue of the rule for which it advocates by shifting the inquiry in airport zoning takings cases

1. LEON TROTSKY, THE REVOLUTION BETRAYED 79 (Max Eastman trans., Dover Publ’ns, Inc. 2004) (1937).

2. E.g., GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT 30 (1998) (suggesting regulatory takings law is “incoherent and muddled”); Allison Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 SUP. CT. REV. 63, 63 (1962) (calling takings law the “crazy-quilt pattern of Supreme Court doctrine”); James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997) (“Regulatory takings are widely regarded as a puzzle.”); William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1151 (1997) (noting that the Takings Clause “is famous for inspiring disagreement”).

3. See MINN. STAT. § 360.062(a) (2010) (codifying the existence of dangers to lives and property of those in and around an airport); MINN. R. 8800.2400, subpt. 6(E)(1) (2011) (describing the interests airport safety zoning balances); *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 307 n.5 (Minn. 2011) (“Airport runway safety zoning is arguably *sui generis* . . .”). See generally 1 DUNNELL MINN. DIGEST AERONAUTICS § 6.01 (5th ed. 2002) (discussing the policy bases for airport zoning standards).

4. 796 N.W.2d. 299 (Minn. 2011).

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

from a balancing test to a debate about what constitutes a “significant” amount of money without providing guidance as how to analyze that question.⁸

II. HISTORY

Because the language of the takings provision of the Minnesota Constitution⁹ is similar to¹⁰ but somewhat broader than¹¹ the Fifth Amendment of the U.S. Constitution,¹² Minnesota takings law is, to some extent, intertwined with federal takings law. It is appropriate, therefore, to begin with federal law and cases interpreting the Fifth Amendment¹³ before turning to Minnesota takings law.

A. Federal Takings

1. Constitutional Basis

The Fifth Amendment of the U.S. Constitution protects individuals from the exercise of eminent domain¹⁴ without adequate compensation and has been read as “a tacit recognition that the power to take private property exists.”¹⁵ Such a right has been viewed as inherent in sovereignty.¹⁶ The protection of citizens

8. See *infra* Part V.

9. “Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.” MINN. CONST. art. I, § 13; see also Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433, 437 (1994) (“The language ‘destroyed or damaged’ was not a part of the original constitution . . .”).

10. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007).

11. *Id.* at 632 n.5 (citing *State v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992)).

12. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

13. For a survey of the major theoretical approaches to takings jurisprudence, see SKOURAS, *supra* note 2, at 67–87.

14. BLACK’S LAW DICTIONARY 601 (9th ed. 2009) (defining “eminent domain” as “[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking”).

15. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11 (4th ed. 1991) (quoting *United States v. Carmack*, 329 U.S. 230, 241 (1946)).

16. NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS 3–4 (1997). These authors explain that this is the reason why the power of eminent domain is not explicitly listed in the Constitution. *Id.* at 4; see also SKOURAS, *supra* note 2, at 11 (tracing authority for the power of eminent domain back to the Roman period but noting such authority is usually traced back to the Magna Carta).

from this inherent power via the Fifth Amendment has been interpreted as

prevent[ing] the public from loading upon one individual more than his just share of the burdens of government, and say[ing] that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.¹⁷

The Fourteenth Amendment's Due Process Clause applies this mandate to state governments.¹⁸

The Supreme Court has classified takings claims into two general categories: physical occupation and regulatory.¹⁹ The former occurs when the government physically occupies land.²⁰ Protection from this type of taking is understood as the original meaning behind the clause.²¹ In the latter instance, landowners argue that the use of their land has been so restricted as to constructively constitute a taking.²² Although regulatory takings were not recognized until the late nineteenth century,²³ this area of

17. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

18. DANIEL R. MANDELKER, *LAND USE LAW* § 2.01 (5th ed. 2003); Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment*, in *CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING* 47, 50 (Patricia E. Salkin ed., 2004).

19. 26 AM. JUR. 2D *Eminent Domain* §§ 10–11 (2011).

20. MANDELKER, *supra* note 18, § 2.02. “The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover.” Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1184 (1967); *see, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (upholding the view that physical occupation of property constitutes a taking).

21. FRED BOSSELMAN ET AL., *THE TAKING ISSUE* 104 (1973) (“There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land.”); *see also* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792 (1995) (noting that early state case law required compensation only for physical appropriation of property). For an overview of the development of the takings clause through *Pennsylvania Coal*, *see id.* at 798–803.

22. *See* MANDELKER, *supra* note 18, § 2.01.

23. Terri L. Lindfors, Note, *Regulatory Takings and the Expansion of Burdens on Common Citizens*, 24 WM. MITCHELL L. REV. 255, 261 (1998); *see also* Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of “Noxious Use,” “Average Reciprocity of Advantage,” and “Bundle of Rights” from Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653, 660 (1987) (stating that *Mugler v. Kansas*, 123 U.S. 623 (1887), was the “first comprehensive analysis” of regulatory takings law). In *Mugler*, the Supreme

law has proven to be very contentious, as the discussion below shows.

The exercise of eminent domain is closely tied to the police power.²⁴ The police power in this context allows state governments “to regulate land use and personal property without incurring the obligation of paying compensation.”²⁵ Drawing a line between when government regulation is a permitted use of the police power and when it enters into the realm of an unconstitutional taking is difficult, however, resulting in a confusing morass of rules and analyses.²⁶ As one commentator noted, “The real bases for many of these decisions may simply be an unarticulated sense of fairness or justice that is shrouded in a cloud of paraphrased quotes from unreconciled state and federal decisions.”²⁷ With that in mind, this note turns to examine how the Supreme Court has tried to analyze

Court held that a state statute which prohibited the sale or manufacture of alcohol was not a taking of a brewery owner’s property because the legislation was made to abate a public nuisance. *Mugler*, 123 U.S. at 675.

24. Arthur G. Boylan, Note, *Losing Clarity in Loss of Access Cases: The Minnesota Supreme Court’s Muddled Analysis in Dale Properties, LLC v. State*, 29 WM. MITCHELL L. REV. 695, 703 (2002). Generally, the police power is “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.” BLACK’S LAW DICTIONARY, *supra* note 14, at 1276. More specifically, it is “[a] state’s Tenth Amendment right, subject to due-process and other limitations, to establish and enforce laws protecting the public’s health, safety, and general welfare, or to delegate this right to local governments.” *Id.* The police power is generally “employed to protect the health, safety, and morals of the community in the form of such things as fire regulations, garbage disposal control, and restrictions upon prostitution and liquor. But it has never been thought that government authority under the police power was limited to those narrow uses.” Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 n.6 (1964) (citations omitted); *see also* Dan Herber, Comment, *Surviving the View Through the Lochner Looking Glass: Tahoe-Sierra and the Case for Upholding Development Moratoria*, 86 MINN. L. REV. 913, 918–19 (2002) (discussing the relationship between eminent domain and the state’s police power).

25. Brian D. Lee, Note, *Regulatory Takings Depriving All Economically Viable Use of a Property Owner’s Land Require Just Compensation Unless the Government Can Identify Common Law Nuisance or Property Principles Furthered by the Regulation—Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), 23 SETON HALL L. REV. 1840, 1844 n.26 (1993). While the police power is technically possessed only by the states, not the federal government, it is necessary to keep the concept of police power in mind while discussing Supreme Court takings cases because the Court is addressing the constitutionality of state actions. DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 74 (8th ed. 2011).

26. *See* Olson, *supra* note 9, at 450 (“[Court] efforts . . . have yielded only profound confusion for practitioners.”).

27. *Id.*

regulatory takings cases.

2. Pennsylvania Coal

The foundational U.S. Supreme Court case analyzing regulatory takings is *Pennsylvania Coal Co. v. Mahon*.²⁸ In *Pennsylvania Coal*, owners of a home in Pennsylvania brought an action against the Pennsylvania Coal Company seeking to enjoin the company from mining coal underneath their property.²⁹ The owners purchased the land from the coal company in 1878, knowing that the deed sold only the surface rights of the land and expressly reserved for the coal company the right to remove all coal beneath it.³⁰ On May 27, 1921, the Pennsylvania legislature adopted the Kohler Act, which forbade mining anthracite coal “in such way as to cause the subsidence of, among other things, any structure used as human habitation.”³¹ Although the Act made some exceptions,³² both parties in the suit agreed that it applied in this instance and that it effectively “destroy[ed] previously existing rights of property and contract.”³³ The Court was asked to consider whether this result of the Kohler Act was a permissible use of the police power or whether it constituted a taking under the Fifth Amendment.³⁴

The Court, in an oft-quoted opinion by Justice Holmes, held that the statute amounted to a taking.³⁵ While noting that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such

28. 260 U.S. 393 (1922). “Genealogists of . . . regulatory takings jurisprudence have found their Adam” in this case. Robert Brauneis, *The Foundation of Our “Regulatory Takings” Jurisprudence: The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 615 (1996); see also WILLIAM A. FISCHER, REGULATORY TAKINGS 13–27 (1995) (analyzing the opinion and arguing that the Court’s ruling had little effect on relations between coal companies and owners of surface rights); see also Hippler, *supra* note 23, at 656–80 (describing the theory of regulatory takings before *Pennsylvania Coal*). *But cf.* Brauneis, *supra*, at 701 (arguing that *Pennsylvania Coal*’s foundational status in regulatory takings jurisprudence stems from “erroneous genealogy”).

29. *Pa. Coal Co.*, 260 U.S. at 412.

30. *Id.*

31. *Id.* at 412–13.

32. *Id.* at 413. Among the exceptions are instances where the same person owns the surface and subsurface land and the coal is at least 150 feet away from another’s property. *Id.*

33. *Id.*

34. *Id.* at 412.

35. *Id.* at 414–15.

change in the general law,”³⁶ the Court nevertheless held that the Act was not a valid exercise of the police power because the extent of the public’s interest in the statute was limited³⁷ and the personal safety issues that subsidence mining created could be dealt with by providing notice to the owners of surface rights.³⁸ A regulation that “goes too far”³⁹ results in a taking because, although the Fifth Amendment provides for the government to take private property that is needed for public use, it ensures that compensation must be made for it.⁴⁰ The Court stated that a limited reading of the amendment is necessary because “the natural tendency of human nature is to extend the qualification [of the police power] more and more until at last private property disappears.”⁴¹ Exactly when a regulation “goes too far,” however, and private property begins to vanish is the million-dollar question. While Justice Holmes did not provide a bright-line rule, he did suggest that the “extent of the diminution” in value of the property is a factor in answering this question⁴² and that “[w]hen [the diminution in value] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.”⁴³

The decision in *Pennsylvania Coal* was not unanimous. Justice Brandeis dissented, arguing that the coal company’s mining of coal so as to cause subsidence of the land amounted to a public

36. *Id.* at 413.

37. *Id.* at 413–14. “Holmes saw no qualitative difference between traditional takings and traditional exercises of the police power, but only a continuum in which established property interests were asked to yield more or less to the pressures of public demands.” Sax, *supra* note 24, at 41.

38. *Pa. Coal Co.*, 260 U.S. at 414. Further on in the opinion, Justice Holmes addresses the safety issue again by differentiating between the case at bar and an earlier case. *Id.* at 415. In *Plymouth Coal Co. v. Pennsylvania*, the Court held that a legislative act requiring coal mining companies to leave a pillar of coal as a barrier between their mine and the mine of another was constitutional. 232 U.S. 531, 544 (1914). The purpose behind the law was to ensure the safety of workers in an adjacent mine if a neighboring mine should be abandoned and fill with water. *Pa. Coal Co.*, 260 U.S. at 415. This case was different, Holmes argued, because the latter act “was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.” *Id.*

39. *Pa. Coal Co.*, 260 U.S. at 415. This standard has been described as “more of an observation about the difficulty in deciding when compensation should be paid than it is a rule capable of precise application.” Olson, *supra* note 9, at 434.

40. *Pa. Coal Co.*, 260 U.S. at 415.

41. *Id.*

42. *Id.* at 413.

43. *Id.*

nuisance,⁴⁴ and the police power is a recognized means⁴⁵ of securing the abatement of such a nuisance,⁴⁶ provided a public interest is protected⁴⁷ and the means for protecting that interest are “appropriate.”⁴⁸ When addressing Justice Holmes’s extent of diminution factor, Justice Brandeis argued that, should diminution in value be used to determine whether a regulation goes too far, the value of the taken property must be compared to the value of the property as a whole.⁴⁹ Otherwise, every regulation could amount to a taking simply by changing the whole from which the

44. *Id.* at 417 (Brandeis, J., dissenting).

45. *Id.*

46. This understanding of the role of the police power in takings claims is an expansion of a theory first set forth by Justice Harlan in *Mugler v. Kansas*, 123 U.S. 623 (1887). Sax, *supra* note 24, at 38–39; *see also* FISCHER, *supra* note 28, at 61 (“The ‘nuisance exception’ may be a sensible rule, but it begs the question of who is to decide what constitutes a nuisance.”); Lindfors, *supra* note 23, at 264 (discussing *Mugler*).

47. *Pa. Coal Co.*, 260 U.S. at 418. A “restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use.” *Id.* at 417.

48. *Id.* at 418. In addressing an exception in the statute for situations where one person owns both the surface and subsurface of the land, Justice Brandeis counters Justice Holmes’s argument by noting that such an exception is not necessary because, “[w]here the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence.” *Id.* at 420. *Cf.* Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149, 172 (1971) (arguing that competing claims of property owners should be resolved by inquiring into what a single, rational owner of the affected resources would do). A similar line of reasoning can be found in tort law and is exemplified by *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (Minn. 1910). There, the court imposed damages on a steamship owner for damage sustained to a dock owned by another when the ship was tied fast to the dock during a storm. *Id.* at 457–60, 124 N.W. at 221–22. “[T]he defendant prudently and advisedly availed itself of the plaintiffs’ [dock] for the purpose of preserving its own more valuable property [the steamship], and the plaintiffs are entitled to compensation for the injury done.” *Id.* at 460, 124 N.W. at 222. Just as a prudent owner of both ship and dock would allow damage to be done to the less valuable item in order to preserve the more valuable one, so too the owner of the land with a house built upon it and the subsurface rights beneath that house would not mine in such a way as to cause the ground to subside unless the value of the coal within the land were enough to outweigh the cost of repairs to make the house inhabitable or the price of relocating.

49. *Pa. Coal Co.*, 260 U.S. at 419. “[W]e should compare [the value of the coal kept in place by the restriction] with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.” *Id.* *Cf.* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978) (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”).

part is derived.⁵⁰ The quandary of deciding just what values should be compared in determining extent of diminution in value of property has been termed the “denominator problem”⁵¹ and persists in regulatory takings cases to this day.⁵²

3. Penn Central

While *Pennsylvania Coal* established a general rule, it provided little instruction as to the application of that rule to subsequent disputes. *Penn Central Transportation Co. v. City of New York*⁵³ attempted to clarify the circumstances under which a regulation “goes too far.” The *Penn Central* dispute centered on a proposed addition of a multi-story office building⁵⁴ above New York City’s Grand Central Terminal,⁵⁵ a building which had been designated⁵⁶ by the Landmarks Preservation Commission (Commission)⁵⁷ as a landmark whose modification required approval from the Commission.⁵⁸ The Commission refused to grant such approval,⁵⁹ and the owners of Grand Central Terminal filed suit.⁶⁰ In a five-three decision,⁶¹ the Court held that the Commission’s denial of the proposal to develop the space above Grand Central Terminal into an office building pursuant to the New York City Landmarks Law⁶² did not constitute a taking.⁶³

In so ruling, the Court enumerated three factors to be used when considering regulatory takings. A court must weigh (1) the

50. *Pa. Coal Co.*, 260 U.S. at 419 (“The sum of the rights in the parts can not [sic] be greater than the rights in the whole.”).

51. JESSE DUKEMINIER ET AL., PROPERTY 1112 n. 28 (7th ed. 2010).

52. See *infra* Parts II.A.3 and III.

53. 438 U.S. 104 (1978).

54. For an artist’s rendering of the proposed designs, see DUKEMINIER, *supra* note 51, at 1117–18.

55. *Penn Cent. Transp. Co.*, 438 U.S. at 116.

56. *Id.* at 115–16.

57. For a general description of the law creating the Commission and the process through which landmark designations are made and can be appealed, see *id.* at 109–15.

58. *Id.* at 112.

59. *Id.* at 117.

60. *Id.* at 104, 119.

61. Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens, penned a dissent that cited lack of an average reciprocity of advantage as a key factor for disagreeing with the majority’s opinion that the law did not constitute a taking in this circumstance. *Id.* at 140 (Rehnquist, J., dissenting).

62. See *id.* at 109–10 for a general description of the law.

63. *Id.* at 138.

economic impact of the regulation on the landowner,⁶⁴ (2) the extent to which the regulation interferes with “distinct investment-backed expectations,”⁶⁵ and (3) the character of the government action.⁶⁶ The Court also noted that takings cases are “essentially ad hoc, factual inquiries.”⁶⁷ Because of the nature of the inquiry and the factors described, this opinion has been criticized for leading to inconsistent results⁶⁸ because the multiplicity of factors to be considered and then balanced in order to reach a conclusion creates considerable variability.

B. *Minnesota Takings*

1. *Constitutional Basis*

Minnesota’s state constitution includes a takings provision,⁶⁹ but it is broader than its federal counterpart,⁷⁰ thereby giving landowners additional protection. Likewise, the state’s statutory definition of “taking” is also quite inclusive, encompassing “every interference, under the power of eminent domain, with the

64. *Id.* at 124.

65. *Id.*

66. *Id.* “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government” *Id.*

67. *Id.* *Cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (“[Articulating when a regulation goes too far] is a question of degree—and therefore cannot be disposed of by general propositions.”).

68. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1316 (1989). See *id.* at 1317–34 for a discussion of the four major takings tests delineated by the Supreme Court. The *Penn Central* test is appropriate in most instances. Boylan, *supra* note 24, at 701. But “[i]t is difficult to discern from the Court’s takings decisions which test the Court would apply in any given case.” Peterson, *supra*, at 1316.

69. See MINN. CONST. art. I, § 13.

70. See U.S. CONST. amend. V. Such an observation can also be made of twenty-four other state constitutions. Allison J. Midden, Note, *Taking of Access: Minnesota Supreme Court Declines to Allow Admission of Evidence of Diminished Access Due to Installation of a Median in a Takings Case*, 25 WM. MITCHELL L. REV. 329, 337 n.58 (1999); see, e.g., ARK. CONST. art. II, § 22 (“[P]rivate property shall not be taken, appropriated or damaged for public use, without just compensation therefor.”); MO. CONST. art. I, § 26 (“[P]rivate property shall not be taken or damaged for public use without just compensation.”); TEX. CONST. art. I, § 17(a) (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made”). The common law provides similarly broadened provisions in the other twenty-six states. Boylan, *supra* note 24, at 705 n.90.

possession, enjoyment, or value of private property.”⁷¹ The purpose of the Minnesota takings provision, however, is the same as that of the Fifth Amendment: it “ensure[s] that the government cannot force ‘some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”⁷² Because much of Minnesota regulatory takings law is based on reasoning adopted by the U.S. Supreme Court, it is similarly confused,⁷³ as is the proper place of the state’s police power.⁷⁴

2. McShane

In certain instances, Minnesota employs rules other than the *Penn Central* balancing test to determine whether a taking has occurred.⁷⁵ One of these is specific to airport zoning regulations and was first articulated in *McShane v. City of Faribault*.⁷⁶ The McShanes, owners of sixty-five acres of land near the Faribault Municipal Airport,⁷⁷ wanted to sell their land,⁷⁸ which had been used for agricultural purposes,⁷⁹ to developers. Use of the land for agriculture had been made impractical or impossible by the trisection of the land by two highways, but the presence of the highways had increased the land’s value for commercial development.⁸⁰ Shortly after the family had negotiated an agreement, which included an option to sell parcels of the land for commercial development, an ordinance was enacted that severely restricted the uses to which forty-two of the acres of land could be put.⁸¹ Suit was brought after attempts to have the ordinance repealed failed.⁸²

The Minnesota Supreme Court held that the airport zoning

71. MINN. STAT. § 117.025, subdiv. 2 (2011).

72. *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 552 (Minn. 1996) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

73. *Boylan*, *supra* note 24, at 707–08.

74. *State ex rel. Lachtman v. Houghton*, 134 Minn. 226, 230, 158 N.W. 1017, 1019 (1916) (admitting that the distinction between lawfully and unlawfully imposed restrictions is considered by courts on a case-by-case basis).

75. For a survey of these tests, see Lindfors, *supra* note 23, at 273–77.

76. 292 N.W.2d 253 (Minn. 1980).

77. *Id.* at 255.

78. *Id.* at 256.

79. *Id.* at 255.

80. *Id.*

81. *Id.* at 255–56.

82. *Id.* at 256.

ordinance did constitute a compensable taking.⁸³ In so holding, the court distinguished⁸⁴ between regulations implemented for the benefit of a government enterprise⁸⁵ and those which are enacted as part of a greater zoning scheme, so-called “‘arbitration’ regulations.”⁸⁶ It held that, when land use regulations are implemented to benefit a specific governmental enterprise, such as an airport, a taking has occurred when a landowner’s property has suffered a “substantial and measurable decline in market value” due to the regulations.⁸⁷ Because the parties in this case agreed the reduction was substantial, the court did not address an appropriate means of determining what constitutes “substantial.”⁸⁸

83. *Id.* at 258–59.

84. *Id.* at 257 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that regulation of land use is not a taking unless it deprives the property of all reasonable use)). The court also drew upon the work of Professor Sax in determining that the maintenance of such a distinction was appropriate. *Id.* at 258 (citing Sax, *supra* note 24).

85. “Governmental enterprise” is “an enterprise undertaken by a governmental body, such as a parks department that creates a public park.” BLACK’S LAW DICTIONARY, *supra* note 14, at 611; *see infra* Part II.B.3; *see also* Sax, *supra* note 24, at 62 (providing a more comprehensive description of government enterprise).

86. *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 306 (Minn. 2011) (citing *McShane*, 292 N.W.2d at 258); *see also* Sax, *supra* note 24, at 62–63 (providing a more comprehensive description of the arbitration function of government). The appellants in *Penn Central Transportation Co. v. City of New York* also argued that the Landmarks Law is an example of government acting in an enterprise function, creating a compensable taking. 438 U.S. 104, 135 (1978). The Court rejected this argument because the law “neither exploits appellants’ parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city.” *Id.*

87. *McShane*, 292 N.W.2d at 258–59.

88. *Id.* at 257. In its recitation of the facts, however, the court showed that both parties came to such a conclusion by using percent diminution in value. *Id.* at 256. By the plaintiffs’ expert, the property’s value had been reduced from \$522,000 to \$360,000. *Id.* The defense contended that the value of one part of the land had been reduced from \$63,740 to \$32,520, and the value of the other part of the land had been reduced from \$179,710 to \$163,000. *Id.* In its opinion, the court errs in its arithmetic in two of the three estimates. The opinion states the diminution in value based on the plaintiffs’ expert’s estimation was 67%, but dividing \$360,000 by \$522,000 yields 68.96% (or about 69%). *Id.* While the opinion states that the defendant’s expert’s estimation of the diminution in value of the first parcel was 50%, doing the math gives a result of 51.02% (or about 51%). *Id.* The court was correct in the diminution in value of the second parcel of land by the defendant’s expert. While the differences in sums may seem inconsequential, the failure of the court to check its math suggests a discomfort working with numbers that could lead to decisions based more on a gut feeling of how much diminution in value is too much rather than an analysis of what percentage crosses the line.

Although one of the remedies the McShanes requested from the court was an order compelling the city to begin condemnation proceedings,⁸⁹ the Minnesota Supreme Court granted the city the option either to repeal the ordinance or to condemn the property.⁹⁰

3. *The Enterprise/Arbitration Distinction*

A key component of the *McShane* decision was its insistence on the maintenance of a distinction between enterprise and arbitration regulations. In an oft-cited article, Professor Sax, seemingly frustrated by the Supreme Court's articulation of multiple and conflicting theories on regulatory takings analysis,⁹¹ enunciated a new definition of property⁹² from which a new takings rule emerged:

[W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.⁹³

The underlying questions courts should be asking, Professor Sax suggested, are “to what kind of competition ought existing values be exposed; and, from what kind of competition ought existing values be protected.”⁹⁴ When the government acts only to mediate

89. *Id.* at 255.

90. *Id.*

91. “It seems appropriate to inquire whether the currently available theories are capable of resolving the problem of the taking cases.” Sax, *supra* note 24, at 46. For a survey of the theories that led Professor Sax to this conclusion, see *id.* at 46–60.

92. Professor Sax defined property as a multitude of existing interests which are constantly interrelating with each other, sometimes in ways that are mutually exclusive. . . . It is more accurate to describe property as the value which each owner has left after the inconsistencies between the two competing owners have been resolved Property is thus the result of the process of competition.

Id. at 61.

93. *Id.* at 67. Professor Sax also noted two exceptions to the requirement for compensation for governmental enterprise: occasions that provide either a reciprocal benefit or an incidental benefit. *Id.* at 73–74.

94. *Id.* at 61.

disputes among competing claimants of property, losses resulting from such action are not compensable.⁹⁵ When the government is a participant in competition for resources and therefore acts in an enterprise capacity, however, concerns over “arbitrary, unfair, or tyrannical government”⁹⁶ support requiring compensation.

When considering the rule in relation to the *Penn Central* factors, Professor Sax’s formulation maintains that the character of the government action is the sole defining factor in a regulatory takings analysis;⁹⁷ the economic impact of the regulation and the property owner’s investment-backed expectations have no place. The *McShane* standard slightly modifies Professor Sax’s rule by creating a hierarchy from the *Penn Central* factors. A court first looks at the character of the government action.⁹⁸ If the regulation was enacted in an arbitration capacity, there is no taking.⁹⁹ A regulation resulting from a government’s enterprise function, however, requires the court to ask a second question: what was the economic impact of that regulation on the value of the property?¹⁰⁰ Under *McShane*, if it was significant, a taking has occurred.¹⁰¹ If not, however, despite the fact that the regulation came about as the result of a governmental enterprise, there has not been a taking.¹⁰² Like Professor Sax’s rule, the *McShane* analysis ignores investment-backed expectations.

Interestingly, nine years before the *McShane* opinion was announced,¹⁰³ Professor Sax wrote another piece in which he admitted that the theoretical underpinnings of his relatively simple rule based on the arbitration/enterprise distinction may be more complex than he originally understood.¹⁰⁴ While the definition of property for which he advocated in this earlier article remained substantially similar,¹⁰⁵ his subsequent approach yielded different

95. *Id.* at 62.

96. *Id.* at 64. For a discussion of these concerns, see *id.* at 64–67.

97. *Id.* at 63.

98. See *McShane v. City of Fairbault*, 292 N.W.2d 253, 258 (Minn. 1980).

99. *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

100. See *id.* at 259.

101. *Id.*

102. *Id.*

103. *McShane* cites Sax, *supra* note 24, which makes the arbitration/enterprise distinction, but it does not make any mention of his subsequent 1971 article. *McShane*, 292 N.W.2d at 258.

104. Sax, *supra* note 48, at 150 n.5.

105. Compare *supra* note 92 with the definition from Professor Sax’s

results in certain circumstances.¹⁰⁶ Professor Sax created a new entity he termed “public rights.”¹⁰⁷ To accommodate these interests, which should be viewed as comparable to private citizens’ right to property, he suggested:

Any demand of a right to use property that has spillover effects¹⁰⁸ . . . may constitutionally be restrained, however severe the economic loss on the property owner, without any compensation being required; for each of the competing interests that would be adversely affected by such uses has, a priori, an equal right to be free of such burdens.

. . . [A]ny uses of property that do not involve such spillover effects *are* constitutionally entitled to protection¹⁰⁹

The underlying purpose of this rule is to maintain a system of property rights that “maximiz[es] . . . the output of the entire resource base upon which competing claims of right are dependent, rather than maint[aining] . . . the profitability of individual parcels of property.”¹¹⁰

subsequent article:

Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing.

Sax, *supra* note 48, at 152.

106. See *infra* notes 195–200 and accompanying text.

107. Sax, *supra* note 48, at 151. “Much of what was formerly deemed a taking is better seen as an exercise of the police power in vindication of what shall be called ‘public rights.’” *Id.*

108. Professor Sax describes spillover effects as having one of three forms. *Id.* at 161–62. The first occurs when the owner of one land uses her land in a way that restricts the use of adjacent land, like coal mining that causes drainage into lower-lying land. *Id.* at 161. The second is use of a common to which other owners have equal right. *Id.* The example Professor Sax used is dumping industrial water into a stream that a downstream landowner uses as a water supply. *Id.* The third type of spillover is use of a property that endangers “the health or well-being of others.” *Id.* at 162.

109. *Id.*

110. *Id.* at 172. Put another way:

[T]he proper decision as to competing property uses which involve spillover effects is that which a rational single owner would make if he were responsible for the entire network of resources affected, and if the distribution of gains and losses among the parcels of his total holding were a matter of indifference to him.

Id. This argument to internalize the externalities of an act can be found in other contexts. *Cf.* Howard Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV.

While the court in *McShane* did not mention Professor Sax's modified view, it is not clear that doing so would have changed the outcome of *McShane*.¹¹¹ Because the facts of *McShane* are very similar to those of *DeCook*, if this reasoning is correct, the effect of Professor Sax's subsequent scholarship may also not have impacted the *DeCook* case.¹¹²

4. Wensmann

Twenty-seven years after *McShane*, in *Wensmann Realty, Inc. v. City of Eagan*,¹¹³ the Minnesota Supreme Court addressed whether a city's refusal to amend a comprehensive city plan to permit residential development of a golf course constituted a taking.¹¹⁴ Rahn Family LP ("Rahn") purchased Carriage Hills Golf Course in 1996 and subsequently began operating it.¹¹⁵ When the city updated its comprehensive plan six years later, the land on which the golf course sat was rezoned from "public facilities" to "parks."¹¹⁶ In 2003, Rahn agreed to sell the property to Wensmann Realty, Inc. ("Wensmann") for commercial development as residential housing, contingent on the city reclassifying the property to permit such use.¹¹⁷ Shortly after Wensmann's application for an amendment to the city plan was denied in 2004,¹¹⁸ Wensmann entered into an option agreement with Rahn to purchase the property. The agreement required Wensmann to file suit against the city to grant the approvals necessary to rezone the land.¹¹⁹ Wensmann did so, alleging an unconstitutional taking.¹²⁰

In its analysis of the case, the court applied the *Penn Central* factors, reasoning that these were appropriate because the appellant was not requesting that the court interpret the Minnesota Constitution differently than the Federal Constitution.¹²¹ While issues of fact on the nature of the economic-impact factor

347, 348 (1967) ("A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities.").

111. See *infra* text accompanying notes 190–96.

112. See *infra* text accompanying notes 190–97.

113. 734 N.W.2d 623 (Minn. 2007).

114. *Id.* at 629.

115. *Id.* at 627.

116. *Id.* at 627–28.

117. *Id.* at 628.

118. *Id.* at 628–29.

119. *Id.* at 629.

120. *Id.*

121. *Id.* at 633.

precluded the court from deciding the ultimate question,¹²² the court did fully analyze the claim under *Penn Central's* rubric and thereby reached a number of conclusions.¹²³ The court held that, in cases where the government chooses to maintain an existing comprehensive plan, the appropriate standard to be used is whether the regulation “leaves any reasonable, economically viable use of the property.”¹²⁴ The court also held that the investment-backed expectations factor weighed in favor of the city,¹²⁵ while the character of the governmental action factor favored the developer.¹²⁶

Although buried in a footnote, the court’s observation that “[w]e do not view the *McShane* analysis as different from or inconsistent with the flexible approach to takings adopted by the Supreme Court in *Penn Central*”¹²⁷ would come to be a key point of contention in the subsequent *DeCook* dispute over whether *McShane* established a separate Minnesota standard for airport zoning takings cases.¹²⁸

122. *Id.* at 637.

123. *See supra* notes 118–20.

124. *Wensmann Realty, Inc.*, 734 N.W.2d at 635. In so doing, the court rejected both the city’s means of measurement (percent diminution in value from before and after the amendment of the comprehensive plan) and the developer’s (comparison of the value of the property as a golf course to its value as a residential development). *Id.* at 634. The court rejected the city’s measurement, however, because it “is not well suited to measure the economic impact of the government’s decision to maintain the status quo.” *Id.*

125. *Id.* at 638.

126. *Id.* at 640.

127. *Id.* at 640 n.14.

128. *Compare* Brief for Respondents at 9, *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299 (Minn. 2011) (A09-969), 2009 WL 8187700, at *12 (interpreting the footnote to mean that “even under *Penn Central*, one of the three factors to be considered is the ‘character of the government action’”), *with* Reply Brief for Appellant at 6, *DeCook*, 796 N.W.2d 299 (No. A09-969) (arguing that the footnote shows that the Minnesota Supreme Court rejected the view that *McShane* constituted a separate test). In the *Wensmann* footnote, the court pointed to two sources which argue that *McShane* did articulate a separate standard. *Wensmann*, 734 N.W.2d at 641 n.14 (citing 25 JAMES R. DORSEY ET AL., MINNESOTA PRACTICE—REAL ESTATE LAW § 10.37 (Eileen M. Roberts ed., 2007) and Boylan, *supra* note 24, at 708). In *Wensmann*, however, the court seemed more persuaded by an argument enunciated in *Pratt v. State Dep’t of Natural Res.*, 309 N.W.2d 767, 774 (Minn. 1981), that “the principles enunciated in *McShane* for determining whether a taking has occurred must be applied with some flexibility.” *Wensmann*, 734 N.W.2d at 641 n.14 (citing *Pratt*, 309 N.W.2d at 774). It is important to note, though, the factual circumstances of *Pratt*. There, the Crow Wing County District Court interpreted a statute to declare certain waters public, even though those waters had previously been held privately. *Pratt*, 309 N.W.2d at 769–70. The court

Wensmann, with its application of the *Penn Central* factors, was based upon modification of a comprehensive land plan,¹²⁹ while *McShane* dealt with the potential taking of land for a government enterprise.¹³⁰ The significance of the distinction and the ambiguity of the footnote in *Wensmann* were not apparent until *DeCook*.

III. THE *DECOOK* DECISION

A. Background

In 1989, plaintiffs Leon and Judith DeCook made two purchases,¹³¹ which resulted in their acquisition of 240 acres of land north of the Rochester International Airport.¹³² The DeCooks first purchased 217 acres on July 11 for \$120,000.¹³³ On December 22, the DeCooks purchased an additional twenty-three acres for \$39,600,¹³⁴ yielding a total purchase price for the entire property of \$159,600.¹³⁵ At the time of purchase, nineteen acres of the property were subject to the most restrictive class of land use regulations known as Safety Zone A.¹³⁶ Safety Zone A restricted the

then had to determine whether the government acted in an enterprise or arbitration capacity when it prohibited the use of mechanical harvesting devices on public waters. *Id.* at 773–74. It noted, “[*McShane*] presented the situation in which the governmental enterprise function of a regulation was not just predominant but exclusive.” *Id.* at 774. A plausible reading of the comment noted by the *Wensmann* court is that such flexibility was necessary in *Pratt* because the scenario did not fall neatly into either the arbitration or enterprise function. *See Wensmann*, 734 N.W.2d at 641 n.14.

129. *Wensmann*, 734 N.W.2d at 632–33.

130. *McShane v. City of Faribault*, 292 N.W.2d 253, 258 (Minn. 1980).

131. Defendant’s Memorandum in Support of Motion for Summary Judgment at 3, *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 2009 WL 1513328 (D. Minn. Feb. 27, 2009) (No. 55-CV-06-3803), 2006 WL 6287378 [hereinafter Defendant’s Summary Judgment Motion].

132. *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 302 (Minn. 2011).

133. Defendant’s Summary Judgment Motion, *supra* note 131, at 3. The DeCooks purchased this land from Joseph and Shirley More. *Id.* This purchase included the eighty acres that would become the center of the dispute. *Id.*

134. *Id.* This land was purchased from the Sportsmen’s Recreation Club. *Id.*

135. *DeCook*, 796 N.W.2d at 302; Defendant’s Summary Judgment Motion, *supra* note 131, at 3.

136. *DeCook*, 796 N.W.2d at 302; *see* MINN. R. 8800.2400, subpt. 5 (2009) (creating three safety zones around an airport). Safety Zone A applies to the approach zone of a runway and “extends outward from the end of the primary surface a distance equal to two-thirds the runway length.” *Id.* Safety Zone B “extends outward from safety zone A a distance equal to one-third the runway length,” and Safety Zone C encompasses “all that land which is enclosed within the

use of land within the zone to agricultural or certain commercial and industrial uses, such as outdoor recreation, parking lots, and cemeteries,¹³⁷ and the DeCooks were aware of this restriction when they bought the land.¹³⁸ From the time of purchase, the DeCooks lived on the property and rented 217 acres of it for farming.¹³⁹ They began developing the eastern eighty acres of the property into a golf course in 1990¹⁴⁰ and opened Oak Summit Golf Course, an eighteen-hole public golf course,¹⁴¹ on June 20, 1992.¹⁴² Since opening the golf course, the DeCooks have expanded it onto approximately 160 acres and continue to own and operate it.¹⁴³

Defendant Rochester International Airport Joint Zoning Board (Board)¹⁴⁴ enacted further restrictions on land surrounding the airport in 2002 via Ordinance No. 4.¹⁴⁵ The ordinance was instituted in furtherance of the airport's master plan to allow a runway to be used as a precision instrument runway.¹⁴⁶ Such runways are advantageous because they make it safer for airplanes to land during adverse weather conditions where visibility is

perimeter of the horizontal zone . . . and which is not included in zone A or zone B.” *Id.*

137. *DeCook*, 796 N.W.2d at 302. While the constraints on land in Zone A are quite restrictive, some uses of the land are permitted:

Zone A shall contain no buildings, temporary structures, exposed transmission lines, or other similar land use structural hazards, and shall be restricted to those uses which will not create, attract, or bring together an assembly of persons thereon. Permitted uses may include, but are not limited to, such uses as agriculture (seasonal crops), horticulture, raising of livestock, animal husbandry, wildlife habitat, light outdoor recreation (nonspectator), cemeteries, and auto parking.

MINN. R. 8800.2400, subpt. 6(B).

138. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, No. A09-969, 2010 Minn. App. Unpub. LEXIS 419, at *1–2 (Minn. Ct. App. May 11, 2010), *aff'd*, 796 N.W.2d 299 (Minn. 2011).

139. Brief for Appellants at 3, *DeCook*, 2010 Minn. App. Unpub. LEXIS 419 (No. A09-969) [hereinafter Appellants' Appeals Brief].

140. *Id.*

141. OAK SUMMIT GOLF COURSE, <http://oaksummitgolf.com> (last visited Sept. 20, 2011). The course offers league play, golf instruction, and tournaments. *Id.*

142. Appellants' Appeals Brief, *supra* note 139, at 3; *see also DeCook*, 796 N.W.2d at 302.

143. Appellants' Appeals Brief, *supra* note 139, at 3.

144. The Board was created pursuant to MINN. STAT. § 360.063 (2011). Complaint ¶ II, *DeCook*, 796 N.W.2d 299 (No. 55-CV-06-3803). The statute grants the Board authority to “adopt and enforce airport zoning regulations.” MINN. STAT. § 360.063, subdiv. 3(a)(1). The Board also has the authority to administer these regulations. *Id.* at subdiv. 3(b).

145. *DeCook*, 796 N.W.2d at 302.

146. Defendant's Summary Judgment Motion, *supra* note 131, at 7.

limited,¹⁴⁷ but Minnesota law required them to maintain a wider approach zone.¹⁴⁸ This ordinance further restricted the uses allowed in,¹⁴⁹ and increased the size of,¹⁵⁰ Safety Zone A from what the previous ordinance required. After the enactment of Ordinance No. 4, twenty-eight additional acres of the DeCooks' property were classified as Safety Zone A.¹⁵¹

B. District Court

The DeCooks commenced an inverse condemnation action against the Board in 2005, alleging that the ordinance had “substantially and materially reduced the owner’s legal ability to develop”¹⁵² the land and created a “substantial and measurable decline”¹⁵³ in the market value of their property for the benefit of a governmental enterprise.¹⁵⁴ In their complaint, the DeCooks asserted that the changes brought about by Ordinance No. 4 had decreased the market value of the property by at least \$460,000.¹⁵⁵ In addition to denying that the zoning ordinance reduced either the DeCooks’ ability to develop the property or the property’s fair market value,¹⁵⁶ the Board also argued, *inter alia*, that the takings claim was premature.¹⁵⁷ The Board moved for summary judgment,

147. *Id.*

148. *Id.* MINN. R. 8800.2400, subpt. 3(E) (2011) sets out the definition of a precision instrument approach zone, and MINN. R. 8800.1200, subpt. 5(E) (2011) requires:

The precision instrument approach surface inclines upward and outward for a horizontal distance of 10,000 feet at a slope of 50:1, expanding uniformly to a width of 4,000 feet, then continues upward and outward for an additional horizontal distance of 40,000 feet at a slope of 40:1, expanding uniformly to an ultimate width of 16,000 feet.

By contrast, the approach surface for non-precision instrument approaches is much smaller. MINN. R. 8800.1200, subpt. 5(D).

149. *DeCook*, 796 N.W.2d at 302.

150. *Id.* at 303.

151. *Id.*

152. Complaint, *supra* note 144, ¶ VI.

153. *Id.* ¶ VIII.

154. *Id.*

155. *Id.* ¶ X.

156. Defendant’s Answer ¶ 6, *DeCook*, 796 N.W.2d 299 (No. 55-CV-06-3803), 2006 WL 6287380.

157. *Id.* ¶ 10. In its motion for summary judgment, the Board explains this position by pointing to case law holding that inverse condemnation actions alleging regulatory takings are not yet ripe if the landowner has not submitted a development plan for the property. Defendant’s Summary Judgment Motion, *supra* note 131, at 17 (citing *Thompson v. City of Red Wing*, 455 N.W.2d 512, 516

which was granted,¹⁵⁸ and the DeCooks appealed.¹⁵⁹

The Minnesota Court of Appeals reversed and remanded the decision,¹⁶⁰ holding that whether a diminution in value had occurred and the extent of such diminution were questions of fact. The court further held that whether a diminution is substantial is a question of law.¹⁶¹ The Minnesota Supreme Court denied the Board's petition for review.¹⁶²

On remand, the jury returned a special verdict in November 2008, establishing the diminution in value of the DeCooks' property as \$170,000.¹⁶³ Applying the *Penn Central* factors per the *Wensmann* decision, the district court found that either a 3.5%¹⁶⁴ or 6.14%¹⁶⁵ diminution in value did not constitute a taking.¹⁶⁶

(Minn. Ct. App. 1990)). The DeCooks had not done so. *Id.* at 18. Because this argument is not addressed in any appellate opinion, it seems likely that subsequent courts agreed with the response enunciated by the DeCooks: that they need not exhaust their administrative remedies before entering the courts because they wished to sell the property to another to develop, not to develop it themselves. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at 11–12, *DeCook*, 796 N.W.2d 299 (No. 55-CV-06-3803), 2006 WL 6287379 (citing *McShane v. City of Faribault*, 292 N.W.2d 253, 256 (Minn. 1980)). The DeCooks also argued that, even if a variance to build on the property had been applied for, Minnesota law would prevent the Board from granting that variance. *Id.* at 12 (stating that the zoning ordinance prohibits a zoning board from granting a variance for any use of the property which is not permitted by the ordinance for property in the zone where the land is located (citing MINN. STAT. § 462.357, subdiv. 6(2) (2010))).

158. *DeCook*, 796 N.W.2d at 303.

159. *Id.*

160. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, No. A06-2170, 2007 Minn. App. Unpub. LEXIS 773, at *13 (Minn. Ct. App. July 31, 2007). In so doing, the court applied the plaintiffs' argument that *McShane* was still good law. *Id.* at *7–8. It also points out that the Minnesota Court of Appeals is “not in [a] position to overturn established supreme court precedent.” *Id.* at *8 (quoting *State v. Ward*, 580 N.W.2d 67, 74 (Minn. Ct. App. 1998)).

161. *Id.* at *11 (citing *Keenan v. Int'l Falls—Koochiching Cnty. Airport Zoning Bd.*, 357 N.W.2d 397, 400 (Minn. Ct. App. 1984)).

162. Appellants' Appeals Brief, *supra* note 139, at 2.

163. *DeCook*, 796 N.W.2d at 304. The Board's appraiser set the diminution at \$110,000, while the DeCooks' appraiser set the diminution at \$425,000. *Id.* It is unclear how the jury reached its verdict of \$170,000, but it could reflect the inherent difficulty in determining the value of land and, correspondingly, the challenge of ascertaining how much economic loss has resulted because of a regulation. “Appraisal is as much an art as a science.” Interview with Howard Roston, Partner, Malkerson Gunn Martin, in Minneapolis, Minn. (Aug. 17, 2011).

164. *DeCook*, 796 N.W.2d at 304 (taking \$170,000 as a percentage of the Board's appraiser's value).

165. *Id.* (taking \$170,000 as a percentage of the DeCooks' appraiser's value); *see also infra* note 185.

166. Or, to put it another way, the DeCooks' property retained 93.86% (using

C. Court of Appeals

The DeCooks appealed, arguing that *McShane*, not *Penn Central*, controlled the analysis of the issue¹⁶⁷ and that, under either the *McShane* or *Penn Central* rules, the \$170,000 reduction in value was enough to constitute a taking.¹⁶⁸ While the Minnesota Court of Appeals agreed with the Board's argument that *McShane* did not provide "a separate and independent legal test for regulatory takings,"¹⁶⁹ and that *Penn Central* did govern the analysis of regulatory takings claims, it nevertheless reversed the district court's decision that the diminution in value did not constitute a taking.¹⁷⁰ The majority held that, even though the DeCooks realize a benefit as well as a burden from the proximity of their property to the airport, they "unequally bear the additional burden of use restrictions,"¹⁷¹ resulting in a diminution of the property's value "with no commensurate benefit."¹⁷² Requiring the DeCooks to sustain such a burden would be "manifestly unfair."¹⁷³

Judge Matthew Johnson dissented from the opinion.¹⁷⁴ In addition to taking issue with the majority's failure to use "a recognized method of measuring the economic impact of the

the Board's pre-ordinance appraisal) or 96.5% (using the DeCooks' pre-ordinance appraisal) of its value even after the enactment of the ordinance.

167. Appellants' Appeals Brief, *supra* note 139, at 6–10. The DeCooks point to the fact that, even though the *McShane* decision discusses *Penn Central*, the Minnesota Supreme Court explicitly adopted a different standard for enterprise zoning regulations. *Id.* at 8–9. They also point to the broader language of the Minnesota Constitution as a basis for asserting that they need not meet the higher "taken" standard of the Federal Constitution because their claim arises under the Minnesota Constitution and its broader language. *Id.* at 10.

168. *Id.* at 11–12. They do so by invoking the definition of "substantial" in the sixth edition of *Black's Law Dictionary*: "[O]f real worth and importance, of considerable value and valuable." *Id.* at 11 (citing BLACK'S LAW DICTIONARY 1428 (6th ed. 1991)). As the Board notes, this definition has been replaced in the dictionary's most recent incarnation by defining substantial only "in the context of some defining legal test or concept." Reply Brief for Appellant, *supra* note 128, at 4–5 (citing BLACK'S LAW DICTIONARY, *supra* note 14, at 1565–66).

169. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, No. A09-969, 2010 Minn. App. Unpub. LEXIS 419, at *10 (Minn. Ct. App. May 11, 2010) (citing *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 641 n.14 (Minn. 2007), *aff'd*, 796 N.W.2d 299 (Minn. 2011)).

170. *Id.* at *14.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at *14–19 (Johnson, J., dissenting).

alleged regulatory takings,”¹⁷⁵ Judge Johnson also argued that the percent diminution in value of the property at issue did not rise to the level of a taking.¹⁷⁶ He noted, “I am unable to find any regulatory takings cases in Minnesota caselaw or federal caselaw in which a property owner was successful with a diminution in value that is remotely close to the diminution in this case,”¹⁷⁷ pointing also to cases where the Minnesota Supreme Court rejected regulatory takings claims on properties whose value was diminished by 75%¹⁷⁸ and 92.5%.¹⁷⁹ As such, “there is no precedent for the principle that a diminution in value of only six percent is enough to allow the conclusion that a compensable regulatory taking has occurred.”¹⁸⁰

D. Minnesota Supreme Court

After granting review, the Minnesota Supreme Court determined that, in actions for a taking under the Minnesota Constitution where relief was based on airport zoning restrictions, the *McShane* rule applies.¹⁸¹ While noting that the Minnesota Supreme Court has applied the *Penn Central* analysis in determining regulatory takings under the Minnesota Constitution,¹⁸² the court declined to do so in this instance because *McShane* drew a distinction between enterprise and arbitration regulations.¹⁸³ While *McShane* did not expressly establish a separate standard for airport zoning regulation takings claims, “a review of the *McShane* briefs to [the Minnesota Supreme Court], and the precedent upon which [the justices] relied, make clear that the *McShane* test applies when relief is sought under the Minnesota

175. *Id.* at *15.

176. *Id.* at *18. *But see infra* note 179.

177. *DeCook*, 2010 Minn. App. Unpub. LEXIS 419, at *17–18.

178. *Id.* at *18 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926)).

179. *Id.* (citing *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915)). While both of these decisions were made before both *Pennsylvania Coal* and *Penn Central*, the Supreme Court has subsequently cited both cases approvingly. *Id.* at *16 (citing *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993)).

180. *Id.* at *18–19.

181. *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 307 (Minn. 2011).

182. *Id.* at 305.

183. *Id.* at 306 (citing *McShane v. City of Faribault*, 292 N.W.2d 253, 257–58 (Minn. 1980)).

Constitution in airport zoning cases.”¹⁸⁴

Additionally, the court applied *McShane* and held that a taking had occurred because the diminution in value was substantial.¹⁸⁵ The court was persuaded by the plaintiffs’ argument that, by common sense and dictionary definition, \$170,000 is substantial.¹⁸⁶ To bolster this assertion, the court also pointed to a comparison of the diminution in value to the purchase price of the property in 1989.¹⁸⁷

IV. ANALYSIS OF THE *DECOOK* DECISION

The court’s adoption of the *McShane* rule over a *Penn Central* analysis in airport zoning takings claims arising under the Minnesota Constitution seems to create a bright-line rule that does away with a criticism leveled at the *Penn Central* factors: inconsistent results.¹⁸⁸ But in rejecting the *Penn Central* factors in favor of *McShane*, the court has both lowered the standard and simply rephrased the question. The key issue now is whether a diminution in value of property as the result of such a regulation is “substantial.”¹⁸⁹ Unfortunately, the court provides little insight into what this means,¹⁹⁰ generating further uncertainty and reinforcing the ad hoc nature of takings claims.

A. *A Special Rule for Airport Zoning Regulatory Takings*

The *McShane* rule appears to set a lower standard for landowners by recognizing regulations that adversely affect their

184. *Id.* at 307.

185. *Id.* at 308–09. It is worth noting that, while the court is not persuaded by the Board’s diminution in value argument, the figure it includes in the opinion is incorrect. The opinion cites one measure that set the percent diminution in value at 6.4% using the pre-regulation value of the DeCooks’ property against the \$170,000 jury verdict. *Id.* This is incorrect. The DeCooks estimated the pre-damage value at \$4.8 million. *Id.* at 304. Dividing \$4.8 million by \$170,000 gives 6.14%, not 6.4%. Because the court correctly notes the value earlier in the opinion in its summary of the district court’s decision, it seems likely that this is a typographical error. *Id.* at 304. It is surprising, though, considering that a similar mathematical error was made, and subsequently not corrected by the *DeCook* decision, in *McShane*. See *supra* note 88.

186. *DeCook*, 796 N.W.2d at 308.

187. *Id.* The \$170,000 jury award exceeds the \$159,600 purchase price by \$10,400.

188. See *supra* text accompanying note 68.

189. *DeCook*, 796 N.W.2d at 304.

190. *Id.* at 308.

property as takings.¹⁹¹ This is a boon to landowners, who now have a lower threshold to meet, and a potential liability for regulators. While *DeCook* made the *McShane* rule the law of the state, it remains to be seen whether carving out a separate standard for such a narrow segment of takings claims is advisable.

One potential problem with maintaining this special rule for airport zoning regulation takings claims is that it is based upon a theory of takings analysis that has been significantly altered by its creator.¹⁹² Such an action should give pause when a theory's staunchest advocate turns to understand the problem in a different and more complex way.¹⁹³ This quibble may be irrelevant, however, because it is unclear whether a different outcome would result in *DeCook* by applying the modification of the rule advocated in Professor Sax's subsequent article.¹⁹⁴

In *Takings, Private Property, and Public Rights*, Professor Sax applied his spillover rule to three variations of an airport zoning dispute.¹⁹⁵ In two of the cases, the first where a landowner wants "to build a tall structure that interferes with flights to and from the airport,"¹⁹⁶ and the second where a landowner wants to live in an area that may be disturbed by airport noise,¹⁹⁷ no compensation would be required.¹⁹⁸ A third variation, however, that of a farmer wanting to farm a tract of land the airport would like to use for a runway,¹⁹⁹ does merit compensation.²⁰⁰ The *DeCook* case shares similarities with scenario one in that airspace above the land, a common,²⁰¹ is part of the dispute. But unlike the first scenario, the

191. *Accord* Interview with Bradley Gunn, Partner, Malkerson Gunn Martin, in Minneapolis, Minn. (Aug. 17, 2011) (reading *DeCook* as adopting a lower threshold than *Penn Central* because the *DeCook* rule only addresses the economic impact of a regulation, ignoring investment-backed expectations and the character of the governmental action). *Contra* Boylan, *supra* note 24, at 708 (referring to the *McShane* standard as a "heightened" one).

192. *See supra* Part II.B.3.

193. *See* Sax, *supra* note 48, at 150 n.5.

194. *Id.* at 164.

195. *Id.* at 164–65.

196. *Id.* at 164.

197. *Id.*

198. *Id.* Compensation would not be required in the former case because the claim involves a decision over the use of a "common, the ambient air, to which both air travellers and landowners below a priori have an equal right of use." *Id.* In the latter case, there would again be no compensation because the conflict could be resolved in either direction. *Id.* at 164–65.

199. *Id.* at 164.

200. *Id.* at 165.

201. The existence of a common "ought to be decided by a determination of

regulation seeks not to control merely the airspace but also the ground beneath it. In this way, it is more like the third scenario. Even under Professor Sax's modified rule, if a judge were to view the *DeCook* scenario as more closely analogous to the third than the first example, compensation would be required.

Additionally, the creation of a rule for such a small segment of takings cases risks creating even more categories to which different standards could apply. It is perhaps likely that the Minnesota Supreme Court will extend *McShane* to cover other enterprise regulations, thereby eliminating the problem of creating many rules with a very narrow focus. Nevertheless, the specter of completely sullyng the already-muddy²⁰² waters of regulatory takings law still remains because, whether or not the court decides to extend *McShane* or to create more categories with special rules, discussion must focus on where to place the boundaries of these categories. As has been seen in earlier cases,²⁰³ trying to decide where the borders are between categories can be just as intractable as resolving takings decisions under other rubrics. All the affirmation of the *McShane* standard has done is rephrase the question without solving the problem.

A virtue of the *McShane* rule is that, because it appears to create a bright-line test over a multi-factor balancing test like *Penn Central's*, the rule should be easier to apply²⁰⁴ and therefore cause less uncertainty for potential litigants. If there has been a significant economic impact on a claimant's property, the government must compensate the landowner or repeal the ordinance that caused the reduction. If the economic impact is not substantial, however, the regulation is not a taking, and no compensation is necessary. The seeming merit of this straightforward test, however, is undercut by the court's lack of instruction as to what constitutes the key component of the rule: "substantial."

whether a resource such as the ambient air is inextricably intertwined with the use of various properties." *Id.* at 164.

202. SKOURAS, *supra* note 2, at 30.

203. See *Pratt v. State Dep't of Natural Res.*, 309 N.W.2d 767, 773-74 (Minn. 1981), where the court had difficulty determining whether the regulation served an enterprise or an arbitration function.

204. This seems to abandon the motto of many previous takings cases, however, which emphasized the fact-specific nature of each particular inquiry. *E.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007) (citing *Westling v. Cnty. of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998)).

B. *What Is “Substantial”?*

After deciding that the *McShane* rule does constitute a separate test for airport zoning regulation takings claims, the court gives two reasons for finding a substantial diminution in value of the DeCooks’ property: \$170,000 is substantial by any definition²⁰⁵ and the damages awarded by the jury exceed the DeCooks’ 1989 purchase price.²⁰⁶ Both are problematic.

The major problem with the court’s rule is that it does not provide a yardstick for measuring “substantial.” While most Americans, this author included, would agree that \$170,000 is a significant amount of money,²⁰⁷ surely such a value cannot be considered substantial in *all* contexts.²⁰⁸ When compared to the millions that many companies expend to run their businesses,²⁰⁹ or even the annual income of some Americans,²¹⁰ such a sum, while nothing to scoff at, amounts to a small accounting error.²¹¹ Conversely, smaller sums of money which, relative to \$170,000, may

205. *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 308 (Minn. 2011).

206. *Id.*

207. When comparing his salary to the jury award, Justice Paul Anderson remarked, “I make \$145,000, so \$170,000 seems like a fair amount of money to me.” Oral Argument at 1:47, *DeCook*, 796 N.W.2d 299 (No. A09-969), available at http://www.tpt.org/courts/MNJudicialBranchvideo_NEW.php?number=A090969. Accord Stuart Alger, *\$170,000 Is Still a Lot of Money, the Minnesota Supreme Court Says*, COM. REAL EST. TRENDS (May 10, 2010), <http://cretrends.com/170000-is-still-a-lot-of-money-the-minnesota-supreme-court-says>.

208. See Reply Brief for Appellant, *supra* note 128, at 5 (noting that without considering diminution in value, “courts have no principled method for weighing the legal consequence of the number”); see also *supra* text accompanying notes 49–52. Cf. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting) (“[V]alues are relative.”).

209. For example, Target spent \$45.7 billion for cost of sales in 2010, with net earnings of \$2.9 billion. TARGET CORP., 2010 ANNUAL REPORT 18 (2010), available at http://sites.target.com/images/company/annual_report_2010/documents/Target_AnnualReport_2010.pdf.

210. In 2010, the average per capita income in Minnesota was \$42,843. *State Annual Personal Income*, BUREAU OF ECONOMIC ANALYSIS (Mar. 2011), <http://www.bea.gov/regional/spi/> (select “summary” under “step 1”; then select “per capita personal income” and “2010” under “step 2”; then follow “display” hyperlink) (last visited Sept. 14, 2011). By contrast, media mogul Oprah Winfrey raked in \$290 million in the same year, and pop star Lady Gaga took home \$90 million. Dorothy Pomerantz, *Lady Gaga Tops Celebrity 100 List*, FORBES.COM (May 18, 2011, 10:00 AM), <http://forbes.com/2011/05/16/lady-gaga-tops-celebrity-100-11.html>.

211. \$170,000 represents 0.00037% of Target’s 2010 cost of sales but nearly 397% of the average Minnesotan’s annual income.

not be incredibly large, may still be substantial relative to the overall value of the property. Would an airport zoning ordinance which reduces the market value of a \$50,000 property to \$25,000 be substantial enough to constitute a taking?²¹² *DeCook* does not say. The rule that emerges from the court's reasoning in this regard is analogous to Justice Stewart's famous line about pornography: "I know it when I see it."²¹³ While such a statement makes for good rhetoric, it does little to elucidate the law.

Additionally, it is puzzling that the Board's calculation of the DeCooks' loss based on percent diminution in value²¹⁴ was rejected in favor of a set dollar value, especially since the *McShane* court points to the percent diminution in value as the means of measuring damages in that instance.²¹⁵ The *DeCook* court's decision does away with Justice Brandeis's denominator problem by tossing the numerator out with the denominator.²¹⁶

Moving the numbers from a takings scenario to a contract dispute further illustrates the difficulty of this holding. A subcontractor who agreed to provide \$100,000 worth of services would be laughed out of court if he were to provide only \$6,140 worth of those services and then demand payment on the contract, minus damages for breach, because he had substantially performed.²¹⁷ Yet the same percentage in an airport zoning takings

212. What about a \$15,000 reduction in the value of a property valued at \$20,000 before implementation of the regulation? Under a percent diminution test, an ordinance causing a seventy-five percent reduction would very likely constitute a taking. But \$15,000 is less than ten percent of \$170,000. Is that enough to be "substantial?" Or is the dollar value of the loss only relevant when the percent diminution in value really is *de minimis*, giving affected property owners a second bite at the apple through *DeCook*?

213. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

214. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 308 (Minn. 2011).

215. *McShane v. City of Faribault*, 292 N.W.2d 253, 258–59 (Minn. 1980).

216. The court did leave open the possibility of using percent diminution in value in some instances, reasoning that "in some other regulatory takings dispute, arithmetic calculations such as those urged by the Board will be persuasive." *DeCook*, 796 N.W.2d at 308. The court provides no insight, however, into the situations where such a rule would be appropriate. See *infra* text accompanying notes 225–26.

217. See CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH* 793 (2010) (noting that substantial performance triggers the aggrieved party's promise to pay, less damages as the result of breach, while the aggrieved party's promise to pay does not arise if there is a material breach). See also 11 ARTHUR L. CORBIN ET AL., *CORBIN ON CONTRACTS* § 55.6 (Joseph M. Perillo ed., Matthew Bender 2011) (discussing the difference between damages and restitution).

claim is regarded as substantial by the Minnesota Supreme Court. How is the value in the contract dispute different from the value in the takings dispute?

To use an example from popular culture, when someone is searching the Internet for reviews of a recent theatrical release, it is crucial to know out of how many possible stars²¹⁸ or thumbs²¹⁹ a movie is rated. The Internet Movie Database allows users to rate films they have seen using a scale of one to ten stars, with ten being the highest.²²⁰ The tabloid magazine *People* also reviews films and rates them using stars, but four stars is the highest honor a movie can earn.²²¹ A film recommended by both the late Gene Siskel and Roger Ebert would earn two thumbs up.²²² Knowing a film received a two, then, is meaningless unless it is clear into which system the two is placed. A two from the Internet Movie Database, where the movie earned only a fifth of the total stars potentially awarded, might lead a person to skip the film altogether. A *People* review of two, however, where a film took home half of its star potential, might warrant a rental fee once the film is available for home viewing. Two thumbs up, though, could be enough of an endorsement to induce a movie buff to swallow the ticket price for a first-run theater experience at the soonest available moment. Just as two in this example means little beyond abstract theoretical concepts, so does \$170,000 without any context.

Comparing the 2006 jury award to the 1989 purchase price in order to support the assertion that the diminution in value was substantial is nonsensical. Such analysis does not take inflation of the purchase price into account,²²³ nor does it reflect the increase

218. This is the rating symbol used by the Internet Movie Database. THE INTERNET MOVIE DATABASE, <http://imdb.com> (last visited Sept. 18, 2011).

219. This was the rating symbol formerly used by movie critics Gene Siskel and Roger Ebert. Joel Sternberg, *Siskel and Ebert*, THE MUSEUM OF BROADCAST COMM., <http://www.museum.tv/eotvsection.php?entrycode=siskelandeb> (last visited Sept. 18, 2011).

220. E.g., *Transformers: Dark of the Moon User Ratings*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1399103/ratings> (last visited Sept. 18, 2011).

221. E.g., Alynda Wheat, *Harry Potter and the Deathly Hallows: Part 2: People Critic's Review*, PEOPLE (July 15, 2011, 6:30 AM), <http://www.people.com/people/article/0,,20509509,00.html>.

222. See *supra* note 219.

223. The 1989 purchase price of \$159,600 had the buying power of \$277,115.80 in 2008, when the jury's award was announced. *CPI Inflation Calculator*, BUREAU OF LAB. STAT., <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Sept. 18, 2011). This is more than \$100,000 greater than the jury award.

in value that accrued to the property during the seventeen years between when the DeCooks purchased it and when they filed suit.²²⁴ This author fails to see how the relationship between these two values has any bearing on whether or not a taking has occurred.

It is possible that the Minnesota Supreme Court was not persuaded by the diminution in value argument because it considers such a measure to be part of the *Penn Central* test, with its spawn of subsequent litigation, and not a key element of the *McShane* rule.²²⁵ While the court leaves the door open to such an argument, it does not specify when it might be persuasive.²²⁶

C. Potential Impact

Aside from offering little guidance to landowners and local zoning officials as to what makes a diminution in value substantial enough to constitute a taking, the *DeCook* decision is likely to have a cooling effect on other municipal airports within the state²²⁷ and on regulation of the Minneapolis-Saint Paul International Airport.²²⁸ The rule does “not end airport zoning, but it would constantly push zoning authorities to discount safety and efficiency in favor of unrestricted use by landowners by making their interests the one thing that cannot be balanced, only bought.”²²⁹ In this instance, the Board is, at the time of this writing, in the process of repealing

224. The pre-damage value of the property was \$4.8 million by the DeCooks' estimate and \$2.77 million by the Board's. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 304 (Minn. 2011).

225. Interview with Bradley Gunn, *supra* note 191.

226. *DeCook*, 796 N.W.2d at 308; *see supra* note 216.

227. *See, e.g.*, Jeanne Schram, *Residents Express Concern About Airport Zoning Ordinance*, AITKIN INDEPENDENT AGE (Mar. 23, 2011, 1:00 PM), <http://www.aitkinage.com/news/item/6118-residents-express-concern-about-airport-zoning-ordinance> (discussing the third public hearing regarding Aitkin Airport zoning changes and emphasizing the several objections by local citizens).

228. The Metropolitan Airports Commission was one of five parties to file amicus curiae briefs with the court. *DeCook*, 796 N.W.2d at 301. Local officials are also worried: “For the Rochester International Airport, any future expansion project that causes nearly any reduction in property value for adjacent property owners will have to be re-examined in order to determine the ‘takings’ cost to the City.” Michael Wojcik, *City Loses Airport Lawsuit*, VOTEWOJCIK.ORG (Mar. 30, 2011), <http://www.votewojcik.org/?p=1075> (citing Letter from Terry Adkins, City Att’y, Rochester, to Michael Wojcik, Councilman, Rochester City Council (date unspecified) (on file with Michael Wojcik)). Mr. Adkins is also concerned about the effect the ruling will have on the Metropolitan Airports Commission. *Id.*

229. Brief for Metropolitan Airports Commission as Amicus Curiae Supporting Appellant at 9, *DeCook*, 796 N.W.2d 299 (No. A09-969).

the ordinance rather than compensating the DeCooks for the jury's award.²³⁰

With only a new rule and the "\$170,000 is substantial" guideline to go by, airports may rethink any modification of their zoning ordinances for fear of litigation or the fiscal impossibility of compensating every adjacent landowner for a deprivation of property rights which may be more theoretical than actual.²³¹ Such a result could impede implementation of the safest and most current aviation technology²³² and potentially impact the local and regional economy if carriers can no longer utilize airports as effectively because those airports do not support current technology.

V. CONCLUSION

After adopting the *McShane* standard for airport zoning regulation takings claims and rejecting the Board's percent diminution in value as a measure for determining whether a reduction in market value is significant, the Minnesota Supreme Court has left communities throughout the state without a means of accurately determining whether their current or potential airport regulations effect takings. While advocates for a rigid system of private property may cheer in this particular instance, the resulting uncertainty of the decision is far from beneficial and only further muddles the already murky²³³ waters of takings jurisprudence. A defendant's best argument in an inverse condemnation action now is not the presentation of a *de minimis* percent diminution in value of the property in question but the

230. Answer Man, *No Payments Made to Plaintiffs in Zoning Case*, ROCHESTER POST-BULLETIN, Apr. 14, 2011, at A2. If the Board is successful, the DeCooks will likely seek to recover damages for the temporary taking of their land from the time of the ordinance's enactment through its repeal. Interview with Bradley Gunn, *supra* note 191.

231. It is unclear what harm was actually done to the development potential of the DeCooks' property, as the DeCooks had not submitted any development plans to the Board. Defendant's Summary Judgment Motion, *supra* note 131, at 9. As the Board points out, much of the land impacted by Zone A is a ravine visible in aerial photographs of the property. Brief for Appellant at 5 *DeCook*, 796 N.W.2d 299 (No. A09-969) (pointing out that the land contains "dense trees, moderate to steep slopes, and a drainage way").

232. See Defendant's Summary Judgment Motion, *supra* note 131, at 7, 26, 33. Enabling technological innovation was the impetus behind Ordinance No. 4. Brief for Appellant at 5 *DeCook*, 796 N.W.2d 299 (No. A09-969).

233. SKOURAS, *supra* note 2, at 30.

hope that the presiding judge will not consider the damages award especially large relative to her salary.